

IN THE COURT OF APPEALS OF THE STATE OF OREGON

FREE OREGON, INC. and MANDATE FREE OREGON, INC., Oregon non-profit corporations; DOCTORS FOR FREEDOM, an unincorporated association; HEALTH FREEDOM DEFENSE FUND; and TAMARA DIMMICK; RASA SIDAGYTE; MICHELLE DAVIS; LISA NAVE; CHARLOTTE PERSINGER; CHRYSTAL GERVAIS; AARON HARRIS; ROY MCGRATH; GLENN CAMPBELL; JESSICA COX; BRITTANY WILSON; JOSHUA WILLIAMS; and MOLLY VALDEZ, individuals,  
Petitioners,

v.

OREGON HEALTH AUTHORITY,  
Respondent.

Court of Appeals No. A176977

**ORDER DENYING MOTION TO STAY**

In this judicial review proceeding pursuant to ORS 183.400, petitioners move for an emergency stay of enforcement of the Oregon Health Authority Administrative Order PH 42-2021 and OAR 333-019-1010, and OAR 333-019-1030 (the vaccine mandates). According to petitioners, emergency relief is warranted because the vaccine mandates will force unvaccinated healthcare workers and school staff to lose their jobs on or before October 18, 2021. Respondent Oregon Health Authority (OHA) opposes the requested stay. As explained below, the motion is denied.

OAR 333-019-1010 requires that "healthcare providers" and "healthcare staff" show proof of vaccination or provide documentation of a medical or religious exception by October 18, 2021, or they may not "work, learn, study, assist, observe, or volunteer in a healthcare setting." OAR 333-019-1030 provides that "[t]eachers, school staff and volunteers" must show proof of vaccination or provide documentation of a medical or religious exception, or they "may not teach, work, learn, study, assist, observe, or volunteer at a school."

The court has authority to stay enforcement of an administrative rule pending completion of judicial review under ORS 183.400. *Northwest Title Loans v. Division of Finance*, 180 Or App 1, 10, 42 P3d 313 (2002).<sup>1</sup> In determining whether to grant a stay pending completion of rule-challenge proceedings, the court considers the likelihood that petitioners will prevail on judicial review, the likelihood of irreparable harm to petitioners in the absence of an immediate stay, and the likelihood of harm to the public

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<sup>1</sup> Although *Northwest Title Loans* was vacated as moot, the court continues to refer to portions of that decision that remain persuasive. *Lovelace v. Board of Parole* (A109609), 183 Or App 283, 288 n 3, 51 P3d 1269 (2002).

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if a stay is granted. See *Northwest Title Loans*, 180 Or App at 13 & n 7. Petitioners assert that the relevant factors support their request for a stay. OHA, in response, argues that the likelihood of harm to the public weighs decisively against a stay, that petitioners have no likelihood of success on the merits, and that petitioners do not face irreparable harm that would justify a stay. In reply, petitioners, in part, emphasize their view that the vaccine mandates are harmful to the public: "Jefferson County, Malheur County, Baker County, Jackson County, and more coming have already declared a State of Emergency caused exclusively by these two vaccine mandate Rules. The vaccine mandate Rules themselves are causing a state of emergency."

The court determines that petitioners have little-to-no likelihood of success on the merits of the rule challenge proceeding. As to that factor, petitioners argue that (1) the vaccine mandates conflict with ORS 431.180; (2) COVID-19 vaccines cannot be mandated under 21 USC § 360bbb-3; (3) the vaccine mandates fail to comply with ORS 183.335; and (4) the vaccine mandates are unconstitutional. In reviewing a rule challenge under ORS 183.400, the court may declare a rule invalid only if the court concludes that it violates constitutional provisions, exceeds the statutory authority of the agency that adopted the rule, or was adopted without complying with rulemaking procedures. *Assn. of Acupuncture v. Bd. of Chiropractic Examiners*, 260 Or App 676, 678, 320 P3d 575 (2014). In considering whether a stay should be granted, the court has evaluated all of the merits arguments set forth in the motion. The court will address many of those arguments in more detail below. Suffice it to say, however, that, although not all of petitioners' "merits" arguments are discussed in detail in this order, the court determines that none of them are sufficient to show a likelihood of success on judicial review.

The court begins with petitioners' contention that the vaccine mandates conflict with ORS 431.180. See *Planned Parenthood Assn. v. Dept. of Human Res.*, 297 Or 562, 565, 687 P2d 785 (1984) (for purposes of ORS 183.400, a rule is deemed to exceed its statutory authority not only if it exceeds the express or implied authority of the statutes it purports to implement, but also if it "contravene[s] some other applicable statute"). ORS 431.180 provides that the public health laws of the state are not to be construed

"as authorizing the Oregon Health Authority or its representatives, or any local public health authority or its representatives, to interfere in any manner with an individual's right to select the physician, physician assistant, naturopathic physician or nurse practitioner of the individual's choice or the individual's choice of mode of treatment, nor as interfering with the practice of a person whose religion treats or administers sick or suffering people by purely spiritual means."

ORS 431.180(1). That limitation does not apply "to the laws of this state imposing sanitary requirements or rules adopted under the laws of this state imposing sanitary requirements." ORS 431.180(2). In petitioners' view, the vaccine mandates "clearly

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and directly interfere with an individual's right to select the choice or mode of treatment in relation to prevention and mitigation related to COVID-19 because the Rules mandate vaccination or the State will force your employer to fire you." OHA responds that the vaccine mandates "do not interfere with any individual's choice of medical treatment for COVID-19." The court determines that petitioners have little likelihood of success on the merits of this argument. The vaccine mandates do not require individuals to receive a COVID-19 vaccine. Instead, they require that a person receive the vaccine or provide documentation of a medical or religious exception as a condition of working in a healthcare setting or K-12 school. Individuals are free to remain unvaccinated--they simply may not work in a healthcare or K-12 school setting if they do so. That does not appear to contravene ORS 431.180, and petitioners are unlikely to prevail on their argument that it does.

Petitioners are likewise unlikely to prevail on the merits of their contention that the vaccine mandates violate 21 USC § 360bbb-3. That statute governs authorization for medical products for use in emergencies and provides, among other things, that with respect to drugs authorized for emergency use, the FDA shall establish conditions "designed to ensure that individuals to whom the product is administered are informed" of "the significant known and potential benefits and risks of such use, and of the extent to which such benefits and risks are unknown," as well as "the option to accept or refuse administration of the product, of the consequences, if any, of refusing administration of the product, and of the alternatives to the product that are available and of their benefits and risks." 21 USC 360bbb-3(e)(1)(A)(ii). Initially, the court observes that the FDA has given its full approval to the Pfizer-BioNTech vaccine for COVID-19 for persons 16 years of age and up. See *Valdez v. Grisham*, \_\_\_ F Supp 3d \_\_\_, 2021 WL 4145746 at \* 4 (DNM, September 13, 2021). Therefore, the provisions of the federal statute discussed by petitioners in the stay motion are not applicable to administration of the Pfizer vaccine to individuals 16 and older. Furthermore, as the court persuasively explained in *Valdez*, although the statutory provisions in question continue to apply to "the Moderna vaccine, the J&J vaccine, and the Pfizer vaccine as administered to individuals under the age of 16, those provisions nowhere prevent the state, or any other entity from requiring certain individuals to be vaccinated against COVID-19." *Id.* Here, as discussed above, individuals are free to remain unvaccinated. Despite the fact that the consequence of the decision not to be vaccinated is that a person may not work in a healthcare setting or school, "to the extent that the vaccines at issue here remain subject to the [Emergency Use Authorization] provisions," the vaccine mandates do not run afoul of those provisions. *Id.* at \*5. Therefore, petitioners are unlikely to succeed on the merits of this argument.

The court turns to petitioners' assertion that the vaccine mandates violate ORS 183.335(5). An agency may adopt a temporary rule if it, among other things, prepares a "statement of findings that its failure to act promptly will result in serious prejudice to the public interest or the interest of the parties concerned and the specific reason for its findings of prejudice" and a "statement of need for the rule and how the rule is intended to meet that need." ORS 183.335(5)(a) & (c). OHA prepared such statements for the

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rules in question here. The Oregon Supreme Court has explained that, "[a]lthough not every prejudice will be sufficiently serious or require sufficiently prompt action to justify bypassing the public participation required by the permanent rulemaking process, the standard that the legislature adopted is [relatively] flexible and permissive." *Friends of the Columbia Gorge v. Energy Fac. Siting Coun.*, 366 Or 78, 92, 456 P3d 635 (2020). Suffice it to say that, although petitioners assert that OHA's rationale, statement of need, and showing of prejudice are "woefully inadequate" here, the court is of the view that petitioners are unlikely to succeed on the merits of those arguments.<sup>2</sup>

Petitioners further argue that the vaccine mandates are unconstitutional because they "have not been narrowly tailored, nor do they use the least restrictive means available, yet they arbitrarily create classes of people and deprive others of important civil rights \* \* \*." Petitioners then cite a number of cases--some state, some federal--some of which implicate the Privileges and Immunities Clause and some of which implicate the Due Process Clause of either the Oregon or United States Constitution. To the extent that petitioners argue that the vaccine mandates violate the Privileges and Immunities Clause, the court rejects that argument. "[O]nly laws that disparately treat a 'true class' may violate that section of the constitution." *Tanner v. OHSU*, 157 Or App 502, 520, 971 P2d 435 (1998). Further, even where a rule creates disparately treated true classes, depending "on what type of true class is involved, the legislation or governmental action may be upheld in spite of the disparity." *Id.* at 521. Disparate treatment of "nonsuspect" true classes may "be justified on a 'rational basis' examination." *Id.* at 523. In this case, neither "healthcare workers" nor "teachers" appear to be "true classes," as that term has been defined, and, even if either group constituted a "true class," neither group is a "suspect" true class. *See id.* at 522-23 (explaining that suspect classes are "defined in terms of 'immutable' characteristics," such as gender, alienage, race, and religion). Petitioners have little-to-no likelihood of success in persuading the court on judicial review that the vaccine mandates have no rational basis.

The court further determines that petitioners are unlikely to succeed on their argument that the vaccine mandates violate the Due Process Clause. Petitioners appear to confuse the doctrine of substantive due process with that of procedural due process. Substantive due process is concerned with the Fourteenth Amendment's prohibition of government infringement on "fundamental liberty interests;" the government is prohibited from infringing on fundamental liberty interests "unless the infringement is narrowly tailored to serve a compelling state interest." *Washington v. Glucksberg*, 521 US 702, 721, 117 S Ct 2258, 138 L Ed 2d 772 (1997) (internal quotations and citations omitted). Indeed, petitioners repeatedly cite *Glucksberg* and other US Supreme Court cases to argue that the vaccine mandates "clearly and directly

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<sup>2</sup> Petitioners also argue that the vaccine mandates are invalid because a temporary rule can only be effective for 180 days, ORS 183.335(6), but for "a person coerced into obtaining the vaccine against their will, the effect is permanent." That argument is without merit and does not warrant further discussion.

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\* \* \* infringe[] on a liberty interest," which requires the court to review the mandates with heightened scrutiny.

Petitioners then cite a number of "controlling cases [that] stand for the proposition that deprivation of an employment interest by a state actor implicates the due process protections of the United States Constitution." However, those cases involve *procedural* due process challenges; procedural due process is concerned with the Fourteenth Amendment's prohibition of government deprivation of any person's life, liberty, or property "without due process of law," which means that, "[b]efore the state deprives someone of a protected property interest, 'the right to some kind of hearing is paramount.'" *Blantz v. Dept. of Corrections and Rehabilitation*, 727 F3d 917, 922 (9th Cir 2013) (quoting *Bd. of Regents of State Colleges v. Roth*, 408 US 564, 569-70, 92 S Ct 2701, 33 L Ed 2d 548 (1972)); see also *Bell v. Burson*, 402 US 535, 542, 91 S Ct 1586, 29 L Ed 2d 90 (1971) ("[D]ue process requires that when a State seeks to terminate an interest such as that involved here, it must afford 'notice and opportunity for hearing appropriate to the nature of the case' before termination becomes effective." (Internal citations omitted.)). Thus, petitioners are correct that, under certain circumstances, the deprivation of an employment interest without certain *procedures* having been followed violates the constitution. However, a constitutionally protected employment interest, for purposes of procedural due process, is not the same thing as a constitutionally protected *fundamental* liberty interest (or "fundamental right," as many cases denote them), for purposes of substantive due process. See *Glucksberg*, 521 US at 726. Therefore, an allegation that petitioners have been or will be deprived of a constitutionally protected employment interest does not require that the court apply heightened scrutiny to the law that is, allegedly, depriving them of that interest. As far as substantive due process is concerned, petitioners make no persuasive argument that their employment interests are fundamental rights, and, as far as procedural due process is concerned, petitioners do not argue that they have not been given the notice and opportunity to be heard that constitute procedural "due process of law." In other words, petitioners have little-to-no likelihood of success on their arguments that the vaccine mandates violate the federal or state constitution.<sup>3</sup>

The likelihood of success factor, together with the risk of harm to the public if a stay is granted, dispositively weighs against granting a stay in this case. Even assuming that petitioners have made a sufficient showing that they will be harmed if a stay is denied, and despite petitioners' urging that the public will be harmed by the vaccine mandate itself, the court agrees with the state that a stay would be harmful to the public. As all involved are aware, this case arises during a pandemic. Since its emergence, the coronavirus has spread throughout the world and COVID-19 has caused hundreds of thousands of deaths in this country. As the rules themselves state, healthcare workers generally have contact with many patients, including those who are

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<sup>3</sup> The court also determines that petitioners are unlikely to succeed on the merits of their Contract Clause arguments.

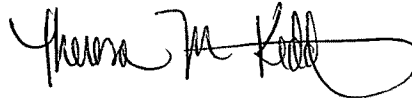
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"more likely than the general public to have conditions that put them at risk for complications due to COVID-19," OAR 333-019-1010(1), and "[c]hildren are required to attend school, which is a congregate setting where COVID-19 can spread easily if precautions are not taken," OAR 333-019-1030(1). According to OHA, requiring workers in healthcare settings and schools to be vaccinated is an effective way to increase vaccination rates and thereby help control COVID-19 and protect the citizens of this state. The state clearly has a strong interest in protecting the general public from the spread of COVID-19, and the rules in question are directly aimed at accomplishing that goal. As the Supreme Court said much earlier in the course of the pandemic in *Elkhorn Baptist Church v. Brown*, 366 Or 506, 509, 466 P3d 30 (2020), although there "have been and will continue to be debates about how best to respond to the threat posed by the coronavirus," to "the extent that those debates concern policy choices, they are properly for policymakers." The executive branch is "uniquely situated, and duty bound, to protect the public in emergency situations and to determine, in such emergencies, where the public interest lies." *Id.* at 546 (Garret, J., concurring). Given the public interests at stake, and the seriousness of the harm caused by the spread of the virus, the court determines that the risk of harm to the public if a stay is granted is significant.

In sum, in light of petitioners' lack of a reasonable likelihood of success on judicial review and the likelihood of harm to the public if a stay is granted, petitioners' motion for a stay of enforcement of the vaccine mandates pending completion of the rule-challenge proceeding is denied.



HERESA M. KIDD  
APPELLATE COMMISSIONER  
10/14/2021 9:08 AM

c: Benjamin Gutman  
Tyler D Smith  
Yasha Renner

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